

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RICHARD R. FURSTENAU,)	
)	
Plaintiff,)	Case No.: 07-CV-6143
)	
v.)	Judge Norgle
)	Magistrate Judge Brown
CITY OF NAPERVILLE, a municipal)	
Corporation; MICHAEL HULL, in his)	
individual and official capacity; DAVID)	JURY TRIAL DEMANDED
DIAL, in his official and individual)	
capacity; MICHAEL CROSS, in his)	
individual and official capacity;)	
PETER BURCHARD, in his official and)	
individual capacity; MARGO ELY,)	
in her individual and official capacity,)	
and JOE MATCHETT, in his individual)	
and official capacity.)	
)	
Defendants.)	

**DEFENDANTS MARGO ELY, JOE MATCHETT, and PETER BURCHARD'S
JOINT MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)**

Defendants MARGO ELY and JOE MATCHETT, by and through their attorneys JAMES G. SOTOS and JOHN J. TIMBO of JAMES G. SOTOS & ASSOCIATES, LTD., and PETER BURCHARD, by and through his attorney, TERRY A. EKL of EKL WILLIAMS PLLC, hereby move this Honorable Court to dismiss them from Plaintiff's amended complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of this Motion, Defendants state as follows:

1. Plaintiff filed a four (4) count complaint on October 31, 2007 against Defendants Naperville Police Chief David Dial, Naperville Police Detective Michael Cross, and Naperville Police Officer Michael Hull, stemming from an incident on a Naperville city street which

occurred on January 1, 2006.¹

2. Plaintiff thereafter filed a four (4) count amended complaint on December 13, 2007, naming as additional defendants (movants herein) City of Naperville City Attorney Margo Ely, the recently resigned City Manager for the City of Naperville Peter Burchard, and Naperville Police Officer Joe Matchett, who is also the President of the Naperville Fraternal Order of Police.

3. Plaintiff's amended complaint alleges that Defendants Ely, Burchard, and Matchett retaliated against him for the exercise of his First Amendment rights in having brought his initial lawsuit by authoring "open letters" to the media which contained false statements. (*See* Ct. III to Am. Compl., p. 22; also paras. 51, 52, 56, 57).

4. The First Amendment retaliation claim brought against movants under Count III and which is based upon the allegations of paragraphs 51, 52, 56, and 57 is not supported by existing law, as such a claim cannot be premised upon one's speech alone. *See Kelly v. Chambers*, 2007 WL 4293633 (N.D.Ill. December 6, 2007); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686-88 (4th Cir. 2000); *Mnyofu v. Bd. of Education*, 2007 WL 1308523, at *3 (N.D.Ill. Apr. 27, 2007); *Villagrana v. Village of Oswego*, 2005 WL 2322808, at *6 (N.D.Ill. Sept. 22, 2005).

5. Movants are also entitled to qualified immunity for the complained of acts of having authored the three open letters. Under the doctrine of qualified immunity, public officials who are performing discretionary functions are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 2515

¹ Defendants Dial, Cross and Hull filed separate answers to Plaintiff's amended complaint on December 31, 2007, the date set for their answer to Plaintiff's original complaint.

(2002); *Wernsing v. Thompson*, 423 F.3d 732, 742 (7th Cir. 2005).

6. Plaintiff has further alleged that Defendant Margo Ely, the City Attorney for the City of Naperville, told individuals whom she perceived as sympathetic to Plaintiff and who have projects which require City Council approval, that if they continued to support Plaintiff, they would not get City Council approval for their projects (*See* Am. Compl. p. 20, para. 55).

7. However, such allegation as a basis for a First Amendment retaliation claim must also fail, as Plaintiff does not have standing to present any claim on behalf of these unidentified third persons, and has not claimed an injury in fact as a result of this allegation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62, 112 S.Ct. 2130 (1992); *Leftkovitz v. Wagner*, 395 F.3d 773, 776 (7th Cir. 2005); *In re: African American Slave Descendants Litigation*, 375 F.Supp.2d 721 (N.D.Ill. July 6, 2005)(J. Norgle).

8. Defendants have attached a memorandum of law in support of their motion to dismiss.

WHEREFORE, Defendants Margo Ely, Joe Matchett, and Peter Burchard respectfully request that this Honorable Court dismiss them from Plaintiff's amended complaint, with costs assessed.

s/John J. Timbo

John J. Timbo, one of the attorneys for
Defendants

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CERTIFICATE OF SERVICE

The undersigned having first been duly sworn under oath, states that he electronically filed a complete copy of the foregoing **Defendants' Margo Ely, Joe Matchett, and Peter Burchard's Joint Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6)** with the Clerk of the Court on **January 9, 2008**, using the CM/ECF system, which will send notification of such filing to the following counsel of record: see attached Service List.

s/John J. Timbo

John J. Timbo, Attorney No. 06238251

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